D.S.E. Concrete Forms, Inc. *and* Carpenters District Council of Houston and Vicinity, Local 551, AFL–CIO. Case 16–CA–14035

July 25, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On January 22, 1990, Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, D.S.E. Concrete Forms, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In App. A of the judge's decision, the dates May 20 and 28 should be February 20 and 28.

[2] We note that the judge found that the practical effect of the Respondent's first three job criteria was to preclude employment of union members at the jobsite. We agree with the judge on the particular facts of this case, as the Respondent specifically defended on the ground that union members would not work nonunion jobs and the General Counsel established that the Union had waived that restriction only for the particular job involved here.

Robert G. Levy II, Esq., for the General Counsel.
Robert E. Luxen, Esq. and *Robert G. Chadwick Jr., Esq. (Gardere & Wynne)*, of Dallas, Texas, for the Respondent.
Victor J. Bieganowski, Esq. (Bieganowski & Allen), of Houston, Texas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The charge was filed on May 10, 1989,[1] by Carpenters District Council of Houston and Vicinity, Local 551, AFL–CIO (the Union),[2] and complaint issued on June 23. It alleges that D.S.E. Concrete Forms, Inc. (Respondent or D.S.E.), since about February 20 has refused to consider for employment at the United States Postal Service facility job project in Houston, Texas (the Postal Service facility), 45 named individuals because they are members of or support the Union, thereby violating Section 8(a)(3) and (1) of the National Labor Relations Act (the Act).

A hearing was held before me on these matters in Houston, Texas, on September 11 and 12. The General Counsel and Respondent subsequently filed briefs, and Respondent thereafter filed a motion requesting permission to file a short reply brief. On the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Texas corporation with a job project and office located at the Postal Service facility in Houston, Texas, where it is engaged as a subcontractor providing concrete work. During the 12 months preceding issuance of the complaint, a representative period, Respondent performed services in excess of $50,000 for customers located outside the State of Texas, and derived gross revenues in excess of of $1 million. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Postal Facility Project*

J. W. Bateson Company (Bateson) is the general contractor for the Postal Service facility project, a 700,000 square-foot building in North Houston constructed of concrete and iron. Bateson subcontracted the concrete work to D.S.E. This work includes steel reinforcement of the concrete (rebar), and the construction of forms for the concrete. Some of the work is performed inside the building and some outside, in connection with a parking lot. D.S.E. had another job in Houston, at the Veterans Administration Medical Center.

Although D.S.E. had the Postal Service facility subcontract from Bateson, it entered into a management contract with another firm, Dalcan, Inc., to whom it assigned the responsibility of supervising the Postal Service facility job. Dalcan and D.S.E. are both based in Dallas.[3] Dalcan's project manager was Jim Renald,[4] and the project superintendent was David Del Bosque.[5] The latter had worked for D.S.E. since February 1988, pursuant to a managerial contract with Dalcan, and came onto the Postal Service facility jobsite in about November 1988, where a D.S.E. trailer-office was established. Renald (Renaud), based in Dallas, visited the jobsite on three or four occasions during the relevant periods.

Several other individuals worked for D.S.E. at the Postal Service facility jobsite in apparently supervisory capacities, including Carpenters Superintendent Homer Staton.[6] A part

[1] All dates are in 1989 unless otherwise specified.

[2] G.C. Exh. 1(a).

[3] The record contains extensive testimony about the relationship between D.S.E. and Dalcan. However, the complaint lists only D.S.E. as a Respondent, and the General Counsel declined at the hearing to amend the complaint so as to include Dalcan.

[4] The correct spelling may be ''Renaud.''

[5] The pleadings establish that Del Bosque was an agent of D.S.E. and a supervisor within the meaning of the Act.

[6] Del Bosque testified: ''I have a Form Superintendent, Carpenter Superintendent, and also a Concrete and Rebar.'' The only other named individuals were Homer Staton, the Carpenters superintendent who was supplied to D.S.E.

of the dispute between the parties involved the posting of applicable wage scales. There was conflicting testimony on the similarities of ''form work'' performed inside and outside the building, i.e., in connection with the parking lot. According to Del Bosque, although ''form work'' was performed outside the building line, it required less expertise than similar work done inside the building, and could be done by a carpenter apprentice rather than a journeyman. Union Business Agent James Herd testified that the outside form work was carpenter's work, except for an ''expansion joint'' which the cement finishers were permitted to install for a ''screed.'' The record is clear that employees doing ''form work'' outside the building were paid at a lesser rate than those doing similar work inside the building. According to Union Representative Herd, the outside rate accounted for less than 4 percent of the cost of the building.

Carpenter Superintendent Staton testified that Respondent hired carpenters based if possible on personal knowledge of the job applicant. On the existence of a job opening, the ''first step'' was to inquire whether D.S.E. had an available employee working on another nearby D.S.E. job, such as the Veterans Administration job. Staton testified that only one such carpenter was so employed.[7] The ''second step'' was to call Dalcan's general superintendent in Dallas,[8] to see whether there were any Dalcan carpenters available for transfer to Houston. Dalcan's employees were not represented by a union. If no individuals were available, the next step was to rely on referrals from employees already working for D.S.E. Finally, the fourth step was to obtain an applicant's name from a ''sign-in roster'' which, Respondent contends, it maintained outside its Postal Service facility office since about November 1988. Staton agreed that he needed skilled carpenters, and that he preferred to hire applicants that he ''knew.'' According to Staton, applicants were hired from the roster on the basis of priority of signing.

Respondent submitted purported copies of 21 sign-in sheets from the roster, and contended that other sheets had been lost during a burglary.[9]

Jerry Oney was a former union member who discontinued his membership at about the beginning of 1988, and thereafter worked nonunion jobs. He testified that he went to the Postal Service facility jobsite in mid-November 1988, and signed an ''application'' at the Bateson trailer. According to Oney, the Bateson clerical employee told him that his application would be transmitted to D.S.E. Oney also went down to the D.S.E. trailer the same day and, he asserted, signed a ''clipboard'' hanging on the door. He returned about 10 days later and spoke to Staton, who informed him that hiring would not begin until after the first of the year. Oney said that he made a third visit after January 1, spoke to Staton again, and signed the roster a second time. Staton called him the next morning, said that an employee had quit after they had ''poured a slab,'' and asked Oney to come to work. He then filled out various forms. What purport to be Oney's signatures appear on the copies of the sign-in roster, on sheets dated December 12, 1988, and January 3, 1989, respectively.[10]

Joseph Sloan was a former union member who discontinued his membership in about April 1988, and thereafter worked nonunion jobs. He testified that he went to the jobsite in November 1988 and filed an application at Bateson's office. Sloan did not know what happened to this application. He returned in December, went to the D.S.E. trailer, asked Del Bosque for a job, and signed a roster. Oney recommended Sloan for employment, and he was hired in about April 1989.

B. *The Job Applications by Union Members*

1. Summary of the evidence

a. *The General Counsel's evidence*

Harold J. Cones Jr., executive secretary of the Carpenters District Council of Houston, testified that the union constitution or bylaws prohibited union members from working on nonunion jobs. However, there were about 100 unemployed members of the Council in February 1989, and Cones expressed the opinion that these people needed to work and support their families. Accordingly, Cones testified, he informed Union Business Representative James Herd that union members who applied for work at the Postal Service facility job would not have charges filed against them because of the nonunion status of the job. Herd corroborated this testimony, and affirmed that the Union overlooked or waived the ban on nonunion jobs in particular cases when it would not be beneficial to the Union to file charges. Herd announced the availability of Postal Service facility jobs at ''roll-call'' meetings.[11]

The evidence is conflicting on the job applications by union members at the Postal Service facility job, the union representatives who were present, and the content of conversations between union and D.S.E. representatives.

Business Representative Herd testified that he went to the Postal Service facility jobsite for the first time on February 1, accompanied by Andres Garza, a representative of the Laborers Union.

According to Herd, his purpose was to obtain a contract and employment for union members. At that time, Herd had received from Cones the waiver of the ban on nonunion work.

Herd testified that he had a conversation at this time with D.S.E. Project Superintendent Del Bosque at about 8 a.m. He started to introduce himself to Del Bosque, but the latter interrupted: ''I know who the hell you are, and I don't have

by Dalcan, and Israel Del Bosque, the ''Concrete Finisher Foreman'' according to his brother David Del Bosque. Israel Del Bosque was not working under a Dalcan contract.

[7] Raul Lopez.

[8] David Myers.

[9] The first two pages have no dates or days of the week. Midway on the third page is the day designation ''Wed.'' and the date of December 7. Midway on the next page a signature is crossed off, and the day ''Monday'' and the date December 12, 1988, appear. The crossed-off signature is repeated on the next line. The date December 13 appears on the same line as a signature. Three later dates appear on blank lines or at the top of the page, and December 19, 1988, appears on the same line as a partial signature, which is repeated on the next line. After two later dates, the same thing occurs with respect to December 28, 1988. After January 3, 1989, appear seven pages of signatures, by far the greatest number attributed to any one date. The date February 14, 1989, appears in a new column headed by the handwritten word ''Date'' (R. Exh. 5).

[10] Ibid.

[11] Union member Joe Reed, who applied for employment on February 20, testified that he did so about 3 weeks after Herd had announced the availability of Postal Service facility jobs. Union members Gary Gardner and Donnie Hooper heard about it on February 20.

anything to say to you.'' Herd introduced Garza, said that his own union had some good carpenters, and offered to sign a project agreement. Del Bosque replied that it was a nonunion job, and that he did not want any union people working there.

Herd then asked whether the prevailing wage rates were posted. When Del Bosque replied that they were posted inside the trailer and Herd asked to see them, Del Bosque initially refused. He then agreed, and showed Herd the posted rates. When Herd protested that these were the ''highway'' rates and were too low, Del Bosque replied that it didn't make any difference, because he wasn't going to have any carpenters on the job. Del Bosque then pulled the correct carpenter rate ($16.08) out of a file cabinet, and pinned it on the board. Herd asked again whether he could send some applicants out, and Del Bosque replied that he was not going to use any carpenters on the job. Herd testified that he did not see a signup roster during this visit, and denied that Del Bosque said applicants had to sign one.

Laborers Representative Andres Garza corroborated Herd. Thus, Garza went to the jobsite with Herd on February 1 in order to obtain work for laborers. After Herd identified himself as a member of Carpenters District Council, Del Bosque replied that he was not going to hire ''those son-of-a-bitches.'' There was a dispute about wage rates, and Herd told Del Bosque that the Davis-Bacon Act required him to post the correct rates outside the trailer in conspicuous places. After Del Bosque posted the correct rate inside the trailer, Herd said that he had ''good professional carpenters.'' The union representative added:

> I can save you some money. I can get you some apprentices in a ratio with journeymen and save you some money. Why don't you think about it? Let me save you some money.

Del Bosque replied that he was not going to hire union members. Garza added that there was no signup roster on February 1.

The next union visit to the jobsite was on February 20, when 21 job applications were filed. There is a sharp conflict in the evidence as to the union representatives on the site at this time. Herd testified that he was not there and that the union representatives were (Adolph) Little and (Rusty) Campbell. Little affirmed that Herd was otherwise busy that day. Union member Donnie Hooper, who filed a series of ''start-up'' forms on February 20,[12] testified that both Herd and Little were present. However, union member Gary Gardner, who also filed on February 20,[13] did not recall that Herd was present.

Little testified that he and Rusty Campbell went to the jobsite at about 9 a.m., on February 20. It was raining that day, and at first Little stood out in the rain. Three of the job applicants who were present that morning[14] also testified that it was raining. After standing outside, Little saw Project Superintendent Del Bosque and said that he had 38 ''good men'' who wanted to file employment applications. Earlier in the morning, the union members had filed employment applications at Bateson's office, according to Little, and began arriving at the D.S.E. trailer-office in small groups. There they were given various ''start-up'' forms.[15] Little testified that some of the applicants may have retained forms. Although Little stated that all of the 45 individuals named in the complaint except one[16] were present on February 20, he was unable to affirm that all filed applications.

Thereafter, the parties stipulated that 21 individuals[17] submitted such packets of forms on February 20 and were seeking carpenter positions. Business Representative Little testified that all these 21 individuals (and others) were qualified to work on carpenter forms. Three of the applicants[18] corroborated Little's testimony. D.S.E. Carpenters Foreman Staton testified that he himself was a journeyman carpenter, could perform all kinds of carpenter work including building forms, and that he assumed that the applicants were members of the Carpenters Union. Staton also agreed that ''sometimes'' he would like to have a laborer performing certain work for purposes of economy.

Little did not know whether there was a signup roster outside the trailer, and did not recall that anybody said anything about one.

Business Representative Herd testified that he returned to the jobsite on February 28 with additional packets of forms, or applications, from eight other individuals. However, he only identified seven of them.[19] All of these individuals were qualified to do concrete form work, in the opinion of Business Representative Little.

Herd saw Project Superintendent Del Bosque in front of the D.S.E. trailer, and started to introduce himself again. Del Bosque interrupted him and said:

> I know who the hell you are, you son-of-a-bitch. You f—d up my whole day, bringing all of them people out here. . . . I don't want any more of that. I don't want none of your people. How many times have I got to tell you that? There's a sign out front. If anybody wants to sign up . . . just get them to sign.''

Herd testified that he had not seen any signup roster during his February 1 visit to the jobsite and, on February 28, asked Del Bosque whether this was a new procedure. Del Bosque replied that it ''didn't make any difference if it's new or not, that's the way we're going to do it from now on.''

[12] G.C. Exh. 3. See fn. 15, infra.

[13] Gardner was uncertain about the date, originally believing it to have been in March, and dated one of the forms as February 18 (G.C. Exh. 4). However, Gardner testified that he was at the jobsite with numerous other applicants on a date clearly established by the record as February 20; the D.S.E. secretary dated her own signature on Gardner's startup forms as February 20; and the parties stipulated that he filed on that date.

[14] Gary Gardner, Donnie Hooper, and Joe Reed.

[15] The forms consisted of a ''Wage Status Agreement'' with provision for a ''building rate'' or a ''site rate''; a W-4 form; an employee information and verification form; an ''employee start-up'' form; an employee acknowledgment of receipt of safety and drug policy and authorization for release of medical information; and a copy of a driver's license (G.C. Exh. 2). Respondent contended that it had no ''employment application'' as such, and caused these forms to be executed after hiring had already taken place.

[16] Karen G. Elliot.

[17] James L. Bridwell, Delbert Campbell, Jimmie Caudle, Allen Edgworthy, Steve Conway, David Drake, Warren Faubian, Gary Gardner, Oscar Garza, C. L. Hammontree, Oscar Hinojosa, Donnie Hooper, Woody Hopkins, Linda Livesay, Ona Merritt, Ricardo Perales, Calvin Rainwater, Joe Reed, Derrell Sample, Gino Sirizzotti, and Jay C. Wagner.

[18] Gary Gardner, Donnie Hooper, and Joe Reed.

[19] Maria James, Earl D. Roach, George D. Parker, Zachary Taylor, Robert C. Atwood, Rocky A. Laird, and Norman K. Burtt. The latter name appears as ''Burke'' in the transcript, but the complaint spells it ''Burtt,'' which I accept as correct.

Herd asked Del Bosque whether any of the applicants who had filed on February 20 were ''qualified and had an opportunity of working'' for D.S.E. The project superintendent replied that ''none of them did,'' and that he did not want ''any of your Union people.''

The business representative asked Del Bosque whether he still had the correct wage rates posted, and the latter replied that it was none of Herd's business. When Herd told Del Bosque that the posting was a requirement of Federal law, Del Bosque allowed him into the trailer, and Herd noted that the wage rates were not posted. Del Bosque again took them out of a file cabinet, put them on the ''tag board,'' and said: ''That's the reason I don't want the Union out here, they're running my business.'' He also told Herd, according to the latter's testimony, that he was going to instruct Bateson to stop union personnel from coming to the D.S.E. trailer.

The Union business representative testified that Del Bosque refused to accept the packets of forms, or employment applications, that Herd was carrying with him.

Herd affirmed that Laborers Representative Garza again went out with him to the jobsite on February 28, but was uncertain whether the latter was present during the conversation with Del Bosque on that date. Garza averred that he went with Herd to visit Del Bosque 2 or 3 weeks after the initial visit on February 1. On cross-examination, Garza was asked about the conversation with Del Bosque ''that took place on February the 20th,'' and responded to the question. Garza also denied on cross-examination that any union member other than he and Herd were present during the second conversation with Del Bosque.

Garza testified prior to Herd at the hearing in this matter. Although Herd was uncertain about Garza's presence during the second conversation with Del Bosque, Garza testified that he was there, and attributed to both Herd and Del Bosque substantially the same statements affirmed by Herd.

Herd went to the Postal Service facility jobsite again on March 7, accompanied by Adolph Little. He carried the same seven employment applications. The business representative first stopped at the Bateson trailer to announce his presence. As he was proceeding toward D.S.E., Bateson Project Manager Frank Dale stopped him, and told him that he was not allowed to go to the D.S.E. trailer. If he had any applications they could be given to Bateson. The union representatives then left, with Herd still carrying the applications.

b. *Respondent's evidence*

D.S.E. Carpenters Superintendent Homer Staton and Bateson Superintendent Sam Moses Jr. averred that they had a conversation with Union Business Representative Herd prior to February 1, but differed as to the date. According to Staton, it took place in either late December 1988 or early January, while Moses contended that it took place on December 2, 1988.[20]

According to Staton, Herd introduced himself and said that he was interested in getting work for his union members. Staton replied that D.S.E. was not hiring any carpenters at that time, but that the union members were welcome to sign the signup roster. Staton contended that he encouraged Herd to get his members to apply. Herd allegedly told Staton that he needed a ''working agreement'' in order to permit union members to work at the jobsite, and Staton replied that Herd would have to talk to ''the boss in Dallas.''

Bateson Superintendent Moses testified that his secretary told him that somebody had signed in and had proceeded to the D.S.E. trailer. Moses examined the sign-in sheet, ''and realized he was with the Carpenters Union.'' Moses then went to the D.S.E. trailer, where Carpenters Representative Herd was talking with Staton and ''rebar'' Foreman Jack Johnson. The union representative said that he was ''just organizing,'' and Moses told him to talk to Bateson's attorney in Dallas.

On cross-examination of Business Representative Herd, Respondent noted the latter's contention that his first visit to the jobsite was on about February 1. Thereafter, the transcript reads as follows:

> Q. Now, isn't it true that, in fact, the D.S.E. representative that you talked to in your first visit to the site said that they were willing to hire Union contract . . . or Union carpenters?
>
> A. No.
>
> Q. That was not said?
>
> A. No.
>
> Q. And isn't it true that your response was I can't have my carpenters go to work until we have a contract?
>
> A. No.
>
> Q. Did you ever tell him that?
>
> A. No.
>
> Q. Did you ever indicate in any way, that the carpenters would go to work without contract?
>
> A. I don't remember whether I specifically said that they could or not at that time.
>
> Q. What was your view at that time? Wasn't it your view that they could not go to work unless there was a contract?
>
> A. No. My view was, at that particular time . . . that I had 150 carpenters unemployed and I needed for them to go to work.
>
> Q. Now, at that time of your first visit, we hadn't had this waiver yet, had we that Mr. Cones talked about?
>
> A. Yes.
>
> Q. Oh, you had?
>
> A. Yes.

Project Superintendent Del Bosque recalled a conversation with Business Representative Herd ''in the beginning of February.'' At least one other person was with him. On initial examination by the General Counsel, Del Bosque said that he did not recognize the names of Garza, Campbell, or Little. On later examination, Del Bosque stated that he saw Little in the hearing room and recognized him. Carpenters Foreman Staton walked in during the ''latter end of the conversation'' in early February.

Del Bosque testified that Herd wanted D.S.E. to sign a project agreement, and to use union members exclusively. He agreed that there was a discussion about wage rates, and that he did not initially show the rates to Herd, because they were posted at Bateson's office. Herd denied that Del Bosque mentioned any such posting by Bateson. Del Bosque agreed

[20] Moses relied on a ''daily report'' to fix the date. The date on the ''daily report,'' which is partially obliterated, appears to read ''Fr- 12-2-88'' (R. Exh. 6).

that D.S.E. had posted the lower ''highway'' rate inside the trailer, but claimed that this posting was a ''mistake.'' According to Del Bosque, Union Representative Herd had nothing to say about the erroneously posted ''highway,'' rate. In fact, he did not even look at it, but saw only the ''right one that was in the file.'' Del Bosque denied cursing or telling Herd that D.S.E. would not hire union members.

Carpenters Superintendent Staton asserted that he entered Del Bosque's office the ''first of February,'' and that the project superintendent was already in conversation with Herd about a working agreement. Staton averred that, ''during the time [he] was in the trailer,'' Del Bosque did not tell Herd that D.S.E. would refuse to hire union members.

Del Bosque, Staton, and Bateson Superintendent Moses contended that Herd was present at the jobsite on February 20, when job applications were filed. However, Del Bosque testified that he saw Herd on only two occasions—the first of February and February 20—but admitted that he affirmed in his pretrial affidavit that Herd returned to the jobsite on February 28. His memory of these events was better on the date of the affidavit, according to Del Bosque. He also denied that it was a rainy day when Herd returned to the jobsite a second time. As noted, the General Counsel's witnesses affirmed that it was raining on February 20, when applications were filed.

On the date that applications were filed, job applicants began crowding into the office, and Del Bosque and Carpenters Foreman Staton assisted in the matter. Finally, Del Bosque told the ''gentleman that was there'' to have the forms completed outside the office. The project superintendent denied telling the union representative that D.S.E. would not hire union members, or that they had caused so much trouble that he did not want their applications. Del Bosque both affirmed and denied telling the union representative that job applicants had to sign a roster outside the trailer. Although Respondent contends that Staton was entirely responsible for hiring carpenters, Del Bosque denied telling this alleged fact to the union representative.

Del Bosque also denied telling Bateson to prevent union representatives from visiting the D.S.E. trailer. Bateson Superintendent Moses testified that, before February 20, D.S.E. asked Bateson to prevent ''anybody'' from visiting them. The reason, Moses asserted, was to prevent ''crowds'' of people around the D.S.E. trailer. On February 20, according to Moses, he received a ''call on the radio about trouble up here.'' Moses went to the D.S.E. office, and allegedly saw Herd and a union representative named ''Rusty'' with a large number of job applicants. Moses assertedly told the applicants that Bateson was the one ''with the applications at that time.'' Asked how he remembered February 20 as a date that Herd was present, Moses stated that it was ''documented.'' However, he did not produce the document.

As indicated, Carpenters Superintendent Staton also contended that he saw Business Representative Herd on February 20. According to Staton's description of the events on that date, Herd brought ''several carloads of carpenters to the jobsite seeking employment.'' After first stopping at Bateson's office where, Staton presumed, they filed applications, the individuals went to the D.S.E. office and asked to fill out applications. ''And I told Mr. Herd then, when I walked in the office and seen all the people, that we had a sign-up roster that people needed to sign up for employment . . . go sign up outside.'' When Herd allegedly demanded employment applications, Staton gave the applicants ''startup'' forms and ran off additional copies in Bateson's office.

According to Staton, he accepted all the startup forms, which he filed in a filing cabinet. During the week of the filing he looked at the files ''a couple of time just to see if there was anyone there that I knew'' but did not examine the files thereafter. Del Bosque simply stated that the forms were filed, and that he never checked them. Staton averred that he ''never needed any carpenters from that file,'' since he had ''plenty of people available prior to that.'' Staton's account of the asserted events of February 20 does not mention Del Bosque.

As described above, Herd testified that he visited the jobsite on February 28, after his visit on February 1, had a conversation with Del Bosque, and attempted without success to deliver additional job applications, or startup forms. Del Bosque denied seeing anybody from the Union after February 20, or receiving such applications. However, he admitted stating in his pretrial affidavit that ''[o]n February 28th, 1989, James Herd returned to the jobsite with the completed applications.'' According to the affidavit, Del Bosque accepted the applications, contrary to his own testimony and to Herd's affirmation that Del Bosque rejected them. At the hearing, Del Bosque professed that he had no memory of these events, and could not explain the presence of the statements in his affidavit.

With respect to Herd's testimony about his visit to the jobsite on March 7, again with the additional applications, Bateson Project Manager Frank Dale did not testify.

2. Factual analysis

The General Counsel's evidence that the Union waived the constitutional ban on nonunion work for union members is uncontradicted, and is credited. The exact date that this waiver was announced to union members is unknown. However, Joe Reed, who applied for work at D.S.E. on February 20, testified that he did so about 3 weeks after Herd announced the availability of the jobs at a rollcall, i.e., at about the end of January. It is possible that prior to announcements had been made, but unlikely that an extended period of time elapsed before announcement of the waiver and the job applications—there were many unemployed union members who needed work. I conclude that the first announcement was probably made in the latter half of January.

As noted, Union Representative Herd testified that he went to the jobsite for the first time on February 1, and then had a conversation with Project Superintendent Del Bosque. He wanted a contract and employment for his union members. However, D.S.E. Carpenters Superintendent Staton and Bateson Superintendent Moses contended that they had a conversation with Herd on an earlier date. Staton claimed that he then encouraged Herd to get his union members to apply, but that Herd said he needed a contract before this could be done.

Staton and Moses did not agree on the date of this alleged conversation. According to Moses' partially obliterated date on a ''daily report,'' it took place on December 2, 1988, while Staton placed it in late December or early January. Herd, however, testified that he already had the waiver when he made his ''first'' visit to the jobsite, on February 1. There is no testimony from Staton that his alleged assurances that

union members could work for D.S.E. were repeated on Herd's subsequent visits to the jobsite, and Herd was a more credible witness than Staton. The latter's claim that Herd demanded a contract before allowing union members to work is inconsistent with the undisputed fact that the Union waived any such requirement. Accordingly, without making a specific finding on the date of Herd's first visit, I credit his denials, elicited on cross-examination, that D.S.E. told him that union members were welcome to work at the jobsite, or that he told D.S.E. he would have to have a contract before permitting them to do so.

There is no question that Carpenters Representative Herd had a conversation at the jobsite with Project Superintendent Del Bosque on about February 1, since both agree to this fact, and Laborers Representative Garza gave similar testimony. Herd's description of his dispute with Del Bosque over the wage rate is set forth in detail above. In light of Del Bosque's admission that he had made the ''mistake'' of posting the wrong ''highway'' rate inside the trailer, his assertion that Herd had nothing to say about this and only looked at the ''right rate'' in the files, is unbelievable. Herd clearly wanted to see a posted, not a filed, wage rate. He was corroborated by Garza, and I credit his version of this part of the discussion with Del Bosque on about February 1.

As noted above, Herd testified that Del Bosque told him that it was a nonunion job, and that D.S.E. did not want any union members working there. As Garza put it, Del Bosque said that he did not want any of ''those son-of-a-bitches.'' Del Bosque denied making such statements, but he was a less credible witness than Herd and Garza. Although Carpenters Superintendent Staton claimed that he did not hear Del Bosque make these statements, Staton came into the trailer during the ''latter end'' of the conversation (according to Del Bosque), and heard only part of it. Herd and Garza corroborated each other about the February 1 conversation, and were more believable witnesses than Del Bosque and Staton. Accordingly, I credit their testimonies that Del Bosque then told Herd that he did not want any union carpenters on the job. I also accept Garza's testimony that Herd offered to save D.S.E. money with a favorable apprentice-to-journeyman ratio.

I credit Herd's and Garza's testimonies that there was no signup roster at the D.S.E. trailer on February 1, and Herd's averment that Del Bosque did not require that job applicants sign such a roster.

As indicated, the parties stipulated that 21 named individuals filed applications for carpenter positions on February 20. The applications were placed in a file. I credit Superintendent Staton's testimony that he looked at them ''a couple of times during the week of the filing, just to see if there was anyone there that [he] knew,'' but not thereafter. There is no evidence that Del Bosque ever examined the applications.

Most of the dispute about February 20 involves the less significant question of whether Herd was present at the jobsite on that day. Herd, Little, and, to a lesser extent, Gary Gardner, affirmed that that he was not there, while Del Bosque, Staton, Moses, and Donnie Hooper declared that he was. As noted, all the General Counsel's witnesses agreed that it was raining that day. The fact that Del Bosque denied it was raining suggests either that all the General Counsel's witnesses were wrong about the weather, or that Del Bosque saw Herd a second time on some other date. Little's testimony about standing in the rain was given in great detail, and was corroborated by three other witnesses. I conclude that it was raining on February 20, and, accordingly, I find that Del Bosque did not see Herd on that date. Bateson Superintendent Moses did not supply an alleged document identifying the date, while D.S.E. Carpenters Superintendent Staton did not even mention Del Bosque on the day of the applications, despite the latter's extensive testimony about his role in the matter. Hooper, I conclude, was mistaken. Because it was not raining when Del Bosque, and allegedly, Moses and Staton, saw Herd and because Herd and Little were truthful witnesses, I conclude that Business Representative Herd's second visit to the jobsite did not take place on February 20. The union representatives were Little and Campbell.

Staton contended that he told ''all the people'' that they had to sign a roster outside, but had the wrong date and did not mention Del Bosque. The latter both affirmed and denied saying anything about a signup roster, while Union representative Little did not recall that anything was said. This evidence is insufficient to warrant a finding of a statement about a signup roster on February 20.

As described above, Herd testified that he had a second conversation with Del Bosque on February 28, but was uncertain about Laborers Representative Garza's presence. The latter, however, affirmed that he went to the jobsite with Herd 2 or 3 weeks after this initial visit with Herd on February 1. Garza's testimony about the conversation with Del Bosque, given before Herd's, is strikingly similar in content. Del Bosque's pretrial affidavit states that Herd returned to the jobsite on February 28. Based on the detail of Garza's testimony, its similarity to Herd's, and Del Bosque's affidavit, I conclude that Garza accompanied Herd during the second conversation which took place on February 28, and that Herd's uncertainty about Garza's presence was the result of a partial loss of recall.

According to Herd and Garza, Del Bosque, after some profanity, blamed Herd for ''bringing all of them people out here,'' and told him that he did not want ''any of your Union people.'' Although Del Bosque denied making such statements, his denial relates to his position that the conversation with Herd took place on February 20, when the applications were filed. Herd and Garza were more believable witnesses, and I credit their testimonies that Project Superintendent Del Bosque told Herd (and Garza) on February 28 that he did not want any union members working at the jobsite, and that none of the applicants on February 20 was qualified.

Herd further stated that—on February 28—Del Bosque told him that job applicants should sign the roster outside. Neither Herd nor Garza had seen any such roster during their prior visit on February 1. When Herd inquired whether this was a ''new procedure,'' Del Bosque replied that ''it didn't make any difference,'' and that this was the way it was going to be done ''from now on.'' Garza corroborated Herd on this issue. Del Bosque's equivocal testimony was insufficient to establish that any such statement was made on February 20. However, crediting Herd and Garza, I conclude that Del Bosque did make the statements attributed to him by Herd and Garza on February 28.

During this conversation, according to Herd, he offered and Del Bosque rejected the additional applications. Del

Bosque's testimony and pretrial affidavit are contradictory, and I credit Herd.

I also credit Herd's testimony that he had another dispute with Del Bosque on February 28 over wage rates, and that they were not posted where Del Bosque had put them on February 1. The project superintendent returned them to the bulletin board with the statement that that was the reason he did not want the union—''they're running my business.''

I credit Herd's uncontradicted testimony that he attempted to return to the D.S.E. trailer again on March 7 with the additional applications, but was stopped by Bateson Project Manager Frank Dale.

C. *Responsibility for the Hiring of Carpenters*

Carpenters Superintendent Staton asserted that he was responsible for the hiring of carpenters, carpenters' helpers, and laborers. He only supervised carpenters inside the building and did no outside work. Staton denied that he reported to Project Superintendent Del Bosque. Instead, Staton averred, he reported to Dallas-based Project Manager Jim Renalt (Renaud). Staton agreed that he ''consulted'' with Del Bosque if he needed carpenters, but contended that he, Staton, made ''all the decisions'' on hiring them. The Carpenters superintendent denied that Del Bosque ever told him not to hire union members. According to Staton, Renalt (Renaud) was also the direct supervisor of Project Superintendent Del Bosque, as well as Staton.

As indicated, Del Bosque testified that he was the ''project superintendent,'' and declared: ''I have . . . a Carpenter Superintendent'' (and other supervisors). Nonetheless, Del Bosque contended that ''only the concrete and rebar entities'' were his responsibility. Del Bosque agreed that he hired ''some'' of the employees that did outside form work, a job which Del Bosque defined as ''form setter/paving and curb.'' There were only five such employees, and they began work in May. As noted, Union Representative Herd estimated that the outside work accounted for about 4 percent of the cost of the building.

Del Bosque asserted that ''the carpenters' responsibility belongs to another person.'' Asked whether he had anything to do with carpenters, Del Bosque replied, ''Not directly.'' Asked whether he had anything to do with them ''indirectly,'' Del Bosque responded, ''Not necessarily.'' Ultimately, Del Bosque denied having anything to do with carpenters. Nonetheless, he reviewed payroll records and changed job classifications, including carpenters' where required. Staton did not perform this function. When the union representative came to the jobsite the second time with applicants for carpenter positions, Del Bosque did not tell him that Staton handled the carpenter hiring. As indicated, Del Bosque repeatedly told Herd that he would not hire members of the Carpenters union.

D. *The Hiring of Carpenters and Laborers*

Staton testified that he hired about 30–40 carpenters and carpenters laborers, and discharged about 25. Staton agreed that there were vacancies for carpenter positions after February 20, and Respondent's records show numerous individuals hired after that date.[21] None of the union members whose applications were submitted or proffered[22] was hired.

E. *Legal Analysis and Conclusions*

It is well established that failure to hire a job applicant because of his union sympathies or activities violates Section 8(a)(3) and (1) of the Act. *Copes-Vulcan, Inc*., 237 NLRB 1253, 1257 (1978), enfd. as mod. 611 F.2d 440 (3d Cir. 1979). The same principles apply when an employer, for the same reasons, fails to *consider* an application for employment.[23]

As set forth above, 21 union members filed employment applications on February 20.[24] Further, Union Representative Herd on February 28 attempted to deliver seven additional applications to Project Superintendent Del Bosque, who rejected them.[25] Considering Del Bosque's repeated statements to Herd that he would not hire any union members and his other antiunion remarks, together with the rejection of the seven applications on February 28, is clear that these union members legally applied for employment on that date. *Packing House & Industrial Services v. NLRB*, 590 F.2d 688 (8th Cir. 1978), enfg. in part 231 NLRB 735 (1977). There is no doubt Respondent knew that the job applicants were union members. None was hired.

Respondent contended at the hearing that the applications were not ''bona fide,'' relying upon the Union's constitutional ban against nonunion work. However, the Union had waived the ban and wanted work for its unemployed members, albeit at the nonunion Postal Service facility job. There is no credible evidence to support Respondent's attack on the bona fides of the applications. Accordingly, this argument has no merit.

Respondent argues that Del Bosque's statements do not establish union animus attributable to D.S.E., because Del Bosque ''had no involvement in the decision to hire or consider for employment any carpenters.''[26] Respondent cites *Midwest Stock Exchange v. NLRB*, 635 F.2d 1255 (7th Cir. 1980), remanding 244 NLRB 1108 (1979). In that case, the Board had adopted a finding of a discriminatory discharge based in part on the statement of one supervisor to another that the employee had been discharged because she was a ''troublemaker,'' although neither supervisor was the one who effected the discharge (id., 244 NLRB at 1114, 1119). The Court of Appeals for the Seventh Circuit concluded that the administrative law judge had ignored other evidence and that there was no evidence that the supervisor making the statement had played a role in the discharge (supra, 635 F.2d at 1262). The Board reached a similar conclusion in another case where the supervisor who made a coercive statement and discharged the employee had previously been ordered by his own superior to terminate the employee. *John J. Hudson, Inc*., 275 NLRB 874 (1985).

The facts in this case appear to be the reverse of those in *Hudson*. Thus, in that case the discharging supervisor had al-

[21] G.C. Exh. 8.

[22] Supra at fns. 17, 19.

[23] *J. D. Landscaping Corp*., 281 NLRB 9, 11 (1986); *Service Operations Systems*, 272 NLRB 1022 (1984); *National Car Rental Systems*, 252 NLRB 159 (1980), enfd. as mod. 672 F.2d 1182 (3d Cir. 1982); *Alexander's Restaurant & Lounge*, 228 NLRB 165 (1977), enfd. 586 F.2d 1300 (9th Cir. 1978).

[24] Supra at fn. 17.

[25] Supra at fn. 19.

[26] R. Br. at 32.

ready been ordered by his own supervisor to terminate the employee, and there was no evidence of animus on the part of the superior. In this case, Plant Superintendent Del Bosque made the coercive statements upon which the General Counsel's case is based.

As indicated, however, Respondent contends that Del Bosque had nothing to do with the failure to hire the job applicants from the Union—it was Carpenters Superintendent Staton's responsibility. Respondent's evidence on its supervisory hierarchy—which is necessary to support this argument—is difficult to believe.

Although Del Bosque was the ''project superintendent'' and testified that he had a ''carpenter superintendent'' (Staton), nonetheless, Del Bosque, after evasive testimony, said he had nothing to do with the carpenters. Del Bosque himself directly supervised only five employees doing outside work, representing about 4 percent of the cost of the building, while Staton hired many more. Both Del Bosque and Staton, according to Respondent, reported to the same project manager, who lived in another city and made only three or four visits to the jobsite during relevant periods of time. If Respondent's contention that Staton did not report to Del Bosque is correct, then D.S.E. had no project superintendent on the site for the great bulk of the work. It is established Board law that the absence of any admitted supervision over employees, or a disproportionately small amount thereof, constitutes evidence that a particular individual is a supervisor. The same reasoning applies to Del Bosque's position as project superintendent and his authority over all employees including carpenters.

Although Staton contended that he made the decisions on hiring, he admitted that he ''consulted'' with Del Bosque about the matter. Del Bosque repeatedly told the Union that he was not going to hire any union members. Despite Respondent's position on Staton's allegedly exclusive authority over carpenters, Del Bosque never informed Herd of this asserted fact during his disputes with the union representative. Del Bosque, not Staton, corrected payroll job classifications including those of carpenters. I conclude that Respondent held out Del Bosque as the hiring authority on carpenters. *Senftner Volkswagen Corp*., 257 NLRB 178, 182 (1981), enfd. 681 F.2d 557 (8th Cir. 1982).[27] Accordingly, I find, the obvious antiunion animus in Del Bosque's statements is attributable to Respondent.

Respondent next argues that even if Del Bosque's animus is attributed to Respondent, none of the union applicants would have been hired ''in any event'' because none met Respondent's hiring requirements. Thus, none was a former or existing employee of D.S.E.; none was a former or existing employee of Dalcan; none had been recommended by a D.S.E. employee; and the signup roster still had a large number of applications on it.[28]

Since both D.S.E. and Dalcan were nonunion, it is unlikely that transfers from either Employer to the Postal Service facility jobsite would have resulted in employment of a union member. The same reasoning applies to the third criterion—since D.S.E. did not hire union members, it is unlikely that any D.S.E. employee would recommend one. Oney, a nonunion employee, recommended Sloan, who was also nonunion. Thus, the practical effect of the first three criteria was to preclude employment at the jobsite by union members.

With respect to the signup roster, the credible evidence shows that none was in place at the D.S.E. trailer-office during the union representatives' visit there on February 1, and that nothing was said about a roster. As indicated, the evidence is insufficient to warrant a finding that there was any roster requirement when the union members filed their applications on February 20—indeed, Del Bosque gave them ''start-up'' forms in lieu of telling them to sign a roster. Union Representative Herd's first knowledge of the roster was on February 28, when he asked whether it was a ''new requirement,'' and Del Bosque replied that it ''didn't make any difference''—that was the way it was going to be done ''from now on.''

These facts cast doubt on the validity of Respondent's position that the roster was in place since November 1988, and that signing it was the procedure by which an application was made. Respondent did not request signing of the roster on February 20, when the first union applications were filed. In addition, there is ambiguous evidence about the filing of applications with Bateson.

The roster itself has characteristics which are questionable—the haphazard dating and interlineations of dates, and the appearance late in the roster of a new column entitled ''Date.''[29] The roster's probative value is not enhanced by the fact that only part of it is in evidence, the remainder assertedly having been lost in a burglary. Although Oney and Sloan testified that they signed such a roster in 1988, and Oney again in January, this constitutes evidence only as to those particular dates. The absence of the roster during the union representatives' first two visits in February suggests strongly that it was not in place at all times prior to February. Its sudden appearance on February 28, after two prior union visits, and Del Bosque's statement that the roster would be used ''from now on,'' suggest that Respondent posted it as a result of the union visits. Because of Respondent's antiunion animus, it is unlikely that any union member would have been hired even if he had signed the roster. These considerations tend to vitiate Respondent's position that it hired from the roster as the ''fourth step'' in this hiring process, and that union members were not ''considered'' because their names were not on the roster.

Respondent's statement of its hiring policies in its brief is not complete. As Carpenters Superintendent Staton testified, he wanted employees whom he ''knew'' because he wanted carpenters who could do a good job. Thus, he looked twice at the applications filed on February 20, but did not consider them after the first week because he did not ''know'' them. However, he knew that they were members of the Carpenters union, and, from his own experience as a journeyman carpenter, that they were qualified to do form work. It is unlikely that he personally knew every individual supplied by the first three hiring criteria—yet some were accepted. The only apparent difference between the validity of the first three criteria as indicia of competence, and that of journeyman status of the February 20 applicants, was that the latter were union members.

[27] See also ''*Restaurant Horikawa*,'' 260 NLRB 197 (1982).

[28] R. Br. 33–34.

[29] Supra at fn. 9.

Respondent could not have rejected the applications filed on February 28 because Staton did not ''know'' the applicants—he did not even know who they were. Del Bosque refused to accept the applications, the only apparent reason being the fact that they came from the Union.

Although Staton agreed that carpenters' laborers were desirable in some kinds of work for purposes of economy, Del Bosque made no response to Herd's offer to save D.S.E. money by means of a favorable ratio of journeymen to apprentices.

For the foregoing reasons, I find that Respondent's hiring criteria do not establish that D.S.E. would not have hired the applicants ''in any event,'' as Respondent argues. Rather, the criteria reinforce the General Counsel's position that the applications were not considered because the applicants were union members. The preponderance of the evidence establishes that Respondent was pursuing a pattern or practice by which it systematically declined to consider any union members for employment.

I, therefore, conclude that, by failing to consider the applications for employment filed by 21 individuals on February 20,[30] and 7 additional individuals on February 28,[31] because of their union sympathies or affiliation, Respondent thereby committed unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. The Respondent, D.S.E. Concrete Forms, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Carpenters District Council of Houston & Vicinity, Local 551, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing since February 20, 1989, and thereafter to consider the individuals listed on Appendix A hereto for employment as carpenters at a jobsite in Houston where it was performing work in connection with a United States Post Office, because the individuals were members of or sympathized with the above-named Union, Respondent thereby committed unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

4. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

The General Counsel acknowledges that there is ''no way of knowing at this juncture how many employee job applicants were impeded'' as a result of Respondent's unlawful failure to consider their applications for employment. The General Counsel argues that ''Respondent should be required to make whole the employees [named in the complaint] and leave to compliance how many persons should have been employed and during what period of time.''[32]

In similar circumstances, the Board has approved of a remedy offering the discriminatee the same or substantially equivalent employment that he would have received ''absent discriminatory consideration,'' plus backpay. *Pierce Governor Co*., 243 NLRB 1009, 1014 (1979). In *National Car Rental System*, supra, the employer discriminatorily refused to consider the transfer of employees from one facility to a new facility, and the Board ordered the employer to offer them the same or substantially equivalent jobs which they would have received ''absent the discrimination against them,'' plus backpay and placement on a preferential hiring list (id., 252 NLRB at 163, 175). Member Penello, dissenting and citing Pierce Governor, argued that it was ''entirely possible that for lawful business reasons unit employees would not in any event have been employed'' at the new facility (id., 252 NLRB at 166).

In *Service Operations Systems*, supra, a contractor was awarded a contract for janitorial services at a Federal office building, where there had been a prior contractor. The new contractor recalled various of its own former employees and hired new employees, but discriminatorily failed to consider for employment individuals employed by the prior contractor, several of whom filed applications. Since it was uncertain which of the ''incumbent'' employees would have been selected absent the discrimination, the administrative law judges recommended that the employer be ordered to hire those who had filed applications prior to the dates of the vacancies based on their seniority with the prior contractor, to pay them backpay from the date they would have been hired, and to place the remainder on a preferential hiring list (272 NLRB at 1043).

The Board agreed with further provisions. It stated that the number of former employees who would have been hired could be determined by subtracting the number of recalled employees from the number actually hired. Since the Employer had unlawfully refused to provide applications to the incumbent employees and had told them they would not hired because of their union affiliation and because the union had filed charges, the Board held that the Employer ''effectively precluded the Board from determining specifically which individuals would have been hired had access to the application process not been discriminatorily denied. The appropriate remedy in this circumstance, where the burden of uncertainty must lie on the wrongdoer, is to require the Respondent to offer by seniority employment to all former incumbent employees, discharging if necessary all other employees hired on or after (the date of unlawful failure to consider employment),'' and to place on a preferential hiring list those for whom positions were unavailable. Member Dennis dissented in part from the Board's decision on the ground that, ''The remedy it provides is for a refusal-to-hire violation, not for a refusal-to-consider violation,'' citing *National Car Rental Systems*, supra (272 NLRB 1033 fn. 1).

In *Blue Cross Blue Shield of Michigan*, 286 NLRB 564 (1987), the employer discriminatorily failed to consider unit employees for a particular position because of their union status. The Board adopted the administrative law judge's remedy that the employer be required to ''consider'' all ap-

[30] Supra at fn. 17.

[31] Supra at fn. 19.

[32] G.C. Br. at 13.

plicants for the position without regard to their union status, and ''to offer jobs . . . to all applicants [represented by the Union] who . . . would have been offered such jobs but for'' the employer's discrimination, dismissing, if necessary, persons hired pursuant to the posting (id. at 587).

In the instant case, unlike those discussed above, the discriminatees did not have employee status, either with this Employer or with a predecessor, as in *Service Operations Systems*. Accordingly, the discriminatees do not have seniority with any employer to serve as a basis of selecting among them for vacancies which occurred. The only way to make such selection is by presentation of evidence of relative competence in a compliance proceeding, or by stipulation. Further, there is the possibility that the person actually selected by Respondent for any such position may have been picked even if D.S.E. had nondiscriminatorily considered all the union applicants. This also is a matter for compliance.

The extent to which D.S.E. followed its professed ''first-come first-hired'' policy based on roster signatures is unknown and probably unknowable, because of the absence of a major part of the roster. In any event, Respondent's own statement of its hiring process placed the first three ''steps,'' or criteria, ahead of the roster. Since the applicants' journeyman status provided assurance of competence at least equal to that of the first three criteria, such status should have had the same priority, ahead of the roster, absent discriminatory motivation.

Although the parties stipulated that the applicants applied for a position as a ''carpenter,'' the record does not contain all the startup forms, or applications. Moreover, Del Bosque told Herd that he was not hiring any ''carpenters,'' when clearly he was doing so. The record contains evidence of changes in job classifications, and of employees working in jobs other than their purported classifications. The record does not disclose whether Respondent in all instances employed an applicant in the same position for which he or she applied. The precise nature of all applications needs to be determined in a compliance proceeding, as well as Respondent's method of dealing with them, and whether Respondent in practice ''did not limit its consideration of an applicant to the specific positions listed on the application.'' *Alexander Dawson, Inc. v. NLRB*, 586 F.2d 1300, 1304 (9th Cir. 1978), enfg. 228 NLRB 165 (1977).

Accordingly, I shall recommend that Respondent be ordered to offer employment, in the applied for job if available but to another if the former is unavailable, to every discriminatee whose name appears on Appendix A and who filed an employment application on or prior to the date of a vacancy, where such employment would have been consistent with Respondent's hiring practices absent its discriminatory policies, and where such discriminatee is superior in qualifications both to other such applicants and to the employee selected by Respondent, discharging the latter if necessary.

I shall further recommend that Respondent bear the burden of proving by a preponderance of the evidence that the employee whom it actually selected for a particular vacancy had qualifications superior to those of the union applicant with the best qualifications. The Board with judicial approval has shifted to the employer the burden of proving that the employee would not have accepted a timely offer of reinstatement, had one been made. *NLRB v. Trident Seafoods Corp*., 642 F.2d 1148 (9th Cir. 1981), enfg. 244 NLRB 566 (1979). Since Respondent by its wrongdoing has contributed to the uncertainty surrounding the identity of the individual who would have been selected for each vacancy absent Respondent's discrimination, it is appropriate that it be required to prove that the individual whom it did select was in fact the one best qualified for the job.

If the Postal Service facility job has been completed by the time for compliance, it would be meaningless to require a job offer at that jobsite. Accordingly, I shall recommend that such offers include other jobsites where Respondent is performing work, starting with those closest to the Houston, Texas metropolitan area. *Superior Warehouse Grocers*, 277 NLRB 18, 27 (1985).

In the event that the union applicant offered such position refuses same, or fails to respond within a reasonable time, Respondent shall offer the position to the next best qualified union applicant, and so on until the list of such applicants is exhausted. All discriminatees not thus offered positions shall be placed on a preferential hiring list, and be offered positions as they become available in the order of the discriminatees' relative competence.

In addition to the offers of employment described above, Respondent shall make whole each applicant whom it would have selected absent its unlawful conduct by paying him or her a sum of money equal to the amount he or she would have earned from the date of the vacancy to the date of such offer less net earnings during such period, to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[33]

I shall also recommend that Respondent be required to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[34]

ORDER

The Respondent, D.S.E. Concrete Forms, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in Carpenters District Council of Houston & Vicinity, Local 551, AFL–CIO, or any other labor organization, by failing or refusing to consider, for employment, applicants for same because of their union activity or sympathies, or by discriminating against them in any other manner with regard to their hire, tenure of employment, or terms and conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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[33] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp*., 231 NLRB 651 (1977).

[34] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) In the manner described in the remedy section of this decision, offer employment in the applied-for job if available, but to another if the former is unavailable, to every discriminatee whose name appears on Appendix A and who filed an employment application on or prior to the date of a vacancy, where such employment would have been consistent with Respondent's hiring practices absent its discriminatory policies, and where such discriminatee is superior in qualifications both to other such applicants and to the employee selected by Respondent, discharging the latter if necessary. Such offer shall include the Postal Service facility jobsite in the Houston, Texas metropolitan area, if not completed, and other jobsites where Respondent may be performing work, starting with those closest to the Houston, Texas metropolitan area. Discriminatees not thus offered employment shall be placed on a preferential hiring list and be offered jobs as they become available.

(b) Make whole all individuals who were unlawfully refused employment, as subsequently determined in a compliance proceeding, in the manner described in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents, for copying, all payroll records, hiring lists, social security payment records, timecards, and all other records necessary to determine the identities of the discriminatees who were denied employment, and the amount of backpay due under the terms of this recommended Order. Such records shall include those at the Postal Service facility job and at all other jobs where Respondent may have been performing work contemporaneously with or subsequent to completion of the Postal Service facility job.

(d) Post at its Postal Service facility jobsite in Houston, Texas, and at all other jobsites where it may be performing work copies of the attached notice marked ''Appendix B.''[35] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[35] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX A

1. Discriminatees who applied for employment on May 20, 1989:

James L. Bridwell	Donnie Hooper
Delbert Campbell	Woody Hopkins
Jimmie Caudle	Linda Livesay
Allen Edgworthy	Ona Merritt
Steve Conway	Ricardo Perales
David Drake	Calvin Rainwater
Warren Faubian	Joe Reed
Gary Gardner	Derrell Sample
Oscar Garza	Gino Sirizzotti
C. L. Hammontree	Jay C. Wagner
Oscar Hinojosa	

2. Discriminatees who applied for employment on May 28, 1989:

Maria James	Robert C. Atwood
Earl D. Roach	Rocky A. Laird
George D. Parker	Norman K. Burtt
Zachary Taylor	

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discourage membership in Carpenters District Council of Houston and Vicinity, Local 551, AFL–CIO or any other labor organization, by failing or refusing to consider for employment applicants for same because of their union activity or sympathies.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer jobs to the best qualified applicants from the Union who applied for work at the Postal Service facility jobsite in Houston, Texas, on or before the dates that vacancies appeared there, and whom we would have hired but for our discriminatory refusal to consider the application of any union member. These offers will include offers at other jobsites.

WE WILL make whole all individuals from the Union whom we would have hired on nondiscriminatory consideration of their applications, by paying them what they would have earned, plus interest, from the date of the appearance of a vacancy until the date we offer them employment.

D.S.E. CONCRETE FORMS, INC.